No. 138, Original

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA, PLAINTIFF

v.

STATE OF NORTH CAROLINA

ON EXCEPTIONS
TO THE FIRST INTERIM REPORT
OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S EXCEPTIONS

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
WILLIAM M. JAY
Assistant to the Solicitor General
JAMES DUBOIS
K. JACK HAUGRUD
KEITH SAXE
THOMAS SNODGRASS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, in an action between two sovereign States seeking an equitable apportionment of an interstate river, an individual user of the river's water has an interest sufficiently distinct from the State's to justify intervention.

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INTEREST OF THE UNITED STATES

South Carolina's exceptions to the First Interim Report of the Special Master present a question regarding the standards for intervention in interstate equitable-apportionment cases brought in this Court under its original jurisdiction. The United States administers numerous water projects and represents sovereign interests of the United States and various Indian Tribes in interstate litigation, including equitable-apportionment actions. See, *e.g.*, *Arizona* v. *California*, 547 U.S. 150, 150 (2006); *Nebraska* v. *Wyoming*, 515 U.S. 1, 4 (1995). The United States also frequently participates in other litigation within the Court's original jurisdiction, as a plaintiff, a defendant, and an intervenor. *E.g.*, *United States* v. *Alaska*, 521 U.S. 1, 4 (1997) (plaintiff); *Califor-*

nia ex rel. State Lands Comm'n v. *United States*, 457 U.S. 273, 277 & n.6 (1982) (defendant); *Texas* v. *Louisiana*, 414 U.S. 1107 (1973) (mem.) (intervenor). The United States therefore has an interest in the proper application of this Court's standards governing intervention in those proceedings, particularly as they implicate the orderly and efficient litigation and resolution of disputes among sovereigns.

The United States has also submitted its views as amicus curiae on other matters relating to the management of the Court's original-jurisdiction docket, often at the Court's invitation. See, *e.g.*, *Montana* v. *Wyoming*, 550 U.S. 932 (2007); *Alabama* v. *North Carolina*, 537 U.S. 806 (2002).

STATEMENT

The State of South Carolina sought and received this Court's leave to file a bill of complaint against the State of North Carolina, seeking an equitable apportionment of the Catawba River. 128 S. Ct. 349 (2007). Three non-state entities sought to intervene as defendants supporting North Carolina. This Court referred the dispute and the motions to intervene to Special Master Kristin Linsley Myles. 128 S. Ct. 1117 (2008); 128 S. Ct. 1694 (2008). In her First Interim Report, the Special Master recommended granting the motions to intervene. South Carolina now excepts to that ruling.

1. The Catawba River rises in the Blue Ridge Mountains of North Carolina and flows east and south into Lake Wylie, a reservoir on the South Carolina border. The Catawba then continues south into South Carolina, where it meets Big Wateree Creek and becomes the Wateree River. Compl. ¶¶ 1, 8, 9. The Wateree eventually becomes the Santee River, which empties into the

Atlantic Ocean approximately 440 miles from the Catawba's headwaters. Answer ¶ 10.

The river is heavily regulated and developed, and is a source of water supply in both States. During times of drought, it is claimed, there is insufficient flow to support water needs in both States. Compl. ¶¶ 8, 10, 11, 15, 17.

2. South Carolina sought leave to invoke this Court's original jurisdiction and commence an action against North Carolina based on its contention that North Carolina has removed more than its fair and equitable share of water from the Catawba. Compl. ¶ 24. South Carolina asked that the Court equitably apportion the Catawba between the two States. Compl. 10.

South Carolina's allegations focus particularly on transfers made pursuant to North Carolina's interbasin transfer statute, N.C. Gen. Stat. § 143-215.22G *et seq.* (2007 & Supp. 2008), which authorizes the transfer of large volumes of water between river basins. The statute requires permitting and state regulatory approval for any transfer over 2 million gallons per day (mgd). N.C. Gen. Stat. § 143-215.22L(a)(1) (Supp. 2008). South Carolina alleges that North Carolina has authorized the transfer of at least 48 mgd from the Catawba River Basin to other basins. Compl. ¶ 3.

According to the complaint, the largest beneficiaries of such permitted transfers have been the Cities of Charlotte, Concord, and Kannapolis, North Carolina. Compl. ¶ 20. South Carolina alleges that a grandfather provision of the statute has also permitted the Catawba River Water Supply Project (CRWSP), which was formed by two adjacent counties in North and South Carolina, to transfer at least 5 mgd from the Catawba.

See Compl. ¶ 21; CRWSP Br. in Supp. of Mot. for Leave to Intervene 1.

The complaint seeks an equitable apportionment of the Catawba and related injunctive and declaratory relief. Specifically, the complaint asks that this Court "enjoin[] North Carolina from authorizing transfers of water from the Catawba River * * * inconsistent with that apportionment." Compl. 10. And the complaint asks that North Carolina's interbasin transfer statute be declared invalid "to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment." *Ibid.*

3. This Court granted leave to file the bill of complaint and directed North Carolina to answer. 128 S. Ct. 349 (2007).

Soon thereafter, three proposed intervenors sought to enter the action. The city of Charlotte; the CRWSP; and Duke Energy Carolinas, LLC (Duke), which operates Lake Wylie and the other hydropower dams on the Catawba, see Duke Br. in Supp. of Mot. to Intervene and File Answer 1-2, all sought to participate based on their interest in using the waters of the Catawba.

This Court appointed the Special Master and referred the case to her, including the motions to intervene. 128 S. Ct. 1117 (2008); 128 S. Ct. 1694 (2008). South Carolina opposed the motions, while North Carolina took no position. N.C. Br. in Opp. to S.C.'s Mot. to File Exceptions 1.

4. The Special Master recommended granting all three motions to intervene. First Interim Report of the Special Master 1-43 (Report).

a. Observing that "the Court's practice has been to allow non-state entities in appropriate circumstances to join, or be joined in, an original action," Report 12, the

Special Master looked to a wide variety of this Court's original-jurisdiction cases for guidance. Although South Carolina pointed out that "the Court never has permitted a private person or non-sovereign entity, including a municipality, to intervene in an original equitable apportionment action," the Special Master concluded that drawing the relevant standard only from equitable-apportionment cases would focus "too narrowly." Report 24. The Special Master accordingly looked to the standards for intervention in other types of original-jurisdiction cases. Report 23-24. She also attributed significance to cases in which the Court permitted States to sue non-state entities. Report 14-16, 25. Although the Special Master recognized that in those cases "the non-state entities were named as defendants by the complaining state, and thus did not voluntarily seek the Court's permission to intervene," she saw no "compelling logical distinction" between those cases and cases involving motions to intervene. Report 16.

From those precedents, the Special Master "distilled the following rule":

> [N]on-state entities may become parties to * * * original disputes in appropriate and compelling circumstances, such as where the non-state entity is the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief, where the non-state entity has an independent property interest that is directly implicated by the original dispute or is a substantial factor in the dispute, where the non-state entity otherwise has a "direct stake" in the outcome of the action within the meaning of the Court's cases discussed above, or

> where, together with one or more of the above circumstances, the presence of the non-state entity would advance the "full exposition" of the issues.

Report 20-21.

b. The Special Master concluded that under the rule she developed, all three non-state entities should be granted intervention. First, in the Special Master's view, South Carolina's complaint that North Carolina was diverting too much water referred specifically to waters diverted and used by Charlotte, "such that [Charlotte] should be permitted to defend itself." Report 22. The Special Master considered Charlotte to be not merely a "user of water," which she acknowledged would be insufficient to justify intervention. *Ibid.* (citing *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam)). Rather, she thought, Charlotte would be directly affected if the Court granted the injunction South Carolina had requested. *Ibid.* Although the Special Master recognized that North Carolina's interests were aligned with Charlotte's, and that the Court had never authorized such an intervention in the equitable-apportionment context, she thought those facts "should not foreclose intervention." Report 23; see Report 25.

Second, the Special Master concluded that CRSWP's basis for intervention was "similar analytically." Report 25. CRSWP, like Charlotte, is referred to in the complaint, and the Special Master stated that CRSWP therefore was more than just "a mere user of water." Report 26. CWSRP had argued in the alternative that it should be allowed to intervene whether or not its interest in the Catawba's water is unique, because of its nature as a bi-state entity (a joint venture of a North Carolina county and a South Carolina water district). The Special Master rejected that alternative argument

as "not compelling," Report 27, and her recommendation rested entirely on CRSWP's purported role in carrying out the complained-of diversions.

Third, although Duke was not discussed in connection with South Carolina's request for injunctive relief, the Special Master thought that Duke's river operations "would be affected by any decree in this action" because its dams effectively control the flow of the Catawba by impounding and releasing its water. Report 28. The Special Master also suggested that Duke might have to change its Comprehensive Relicensing Agreement (CRA), which is pending before the Federal Energy Regulatory Commission (FERC), based on challenges to the "scientific models and assumptions" underlying the CRA that are likely to be presented in this litigation. Report 30. Accordingly, the Special Master concluded that Duke has sufficient unique and directly affected interests to justify intervention to represent and defend those interests. Report 28-32.

SUMMARY OF ARGUMENT

The Special Master sought to formulate a single, one-size-fits-all rule to govern non-state parties' participation in original actions in this Court—whether as named defendants or as intervenors, and whether the action involves water, nuisance, or any other subject. That proposed rule does not take adequate account of the special sovereign interests that are at stake in equitable-apportionment actions. Cases like this one ask this Court to resolve a sovereign dispute over a limited resource that is used by many individuals and public and private entities within each of the party States. The showing required to justify participation by non-sovereigns must accordingly be significantly higher, particu-

larly where the non-sovereign's reason for participation is the pursuit or protection of a water use or claim that arises under state law.

This Court set the standard for permitting intervention in this context in *New Jersey* v. *New York*, 345 U.S. 369 (1953) (per curiam). There a city with an interest in the water of the river whose waters were the subject of the original action sought to intervene, and this Court denied permission, because the city was properly represented by its State in the dispute among sovereigns. The Court held that because of the sovereign nature of the dispute, "[a]n intervenor whose state is already a party should have the burden of showing *some compelling interest in his own right*, apart from his interest in a class with all other citizens and creatures of the state, *which interest is not properly represented by the state*." *Id.* at 373 (emphases added). That is the test the Special Master should have applied. The Special Master incorrectly discounted that holding, largely because the Court allowed another city to remain in the action *as a named defendant*, an entirely different matter subject to different standards.

Applying the correct analysis reveals that the proposed intervenors do not have a sufficiently distinct interest at stake to justify allowing them to interject themselves into this case as parties alongside the States. Rather, they have the same interest as everyone in the Catawba River Basin who hopes to draw water from the river following the equitable apportionment. The breadth of the right to intervene that the Special Master's rule would introduce is reason enough to reject that rule in apportionment cases, which would become immeasurably more complex and difficult to settle with the addition of each new non-sovereign party.

ARGUMENT

HOLDERS OF STATE-LAW WATER RIGHTS DO NOT SATISFY THE STANDARD FOR INTERVENTION IN A SOVEREIGN DISPUTE BETWEEN STATES OVER THE EQUITABLE APPORTIONMENT OF A RIVER

A. The Court Has Enunciated Stringent Standards For Intervention By Non-Sovereigns In Original Actions

1. This Court has original jurisdiction over a justiciable controversy to which a State is a party. See U.S. Const. Art. III, § 2, Cl. 2. This Court's jurisdiction is exclusive if the dispute is between States, but otherwise is concurrent. See 28 U.S.C. 1251(a), (b)(2) and (3). In both types of cases, this Court retains discretion whether to permit a complaining State to initiate suit, and it grants such leave only "sparingly." *E.g.*, *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992) (citation omitted). "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983).

Exercising its discretion, this Court often declines to entertain suits brought by States against citizens of another State, including municipalities and other corporate citizens. *E.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 108 (1972); *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 504 (1971). Indeed, even when one State sues another in an action within this Court's exclusive jurisdiction, the plaintiff State may not be permitted to maintain a separate cause of action against non-state parties as defendants when the defendant State sufficiently represents that side of the controversy. *E.g.*, *Kentucky* v. *Indiana*, 281 U.S. 163, 174-175 (1930).

For similar reasons, this Court has often declined to permit non-sovereign entities to force their way, through intervention, into a dispute between sovereigns. See, *e.g.*, *Alaska* v. *United States*, 534 U.S. 1103 (2002) (mem.); *New Jersey* v. *New York*, 514 U.S. 1125 (1995) (mem.); *Ohio* v. *Kentucky*, 456 U.S. 958 (1982) (mem.); *Kentucky* v. *Indiana*, 456 U.S. 958 (1982) (mem.); *Vermont* v. *New York*, 405 U.S. 983 (1972) (mem.)

2. Equitable-apportionment actions involve the "unique interests" of sovereign States, *Colorado* v. *New Mexico*, 467 U.S. 310, 316 (1984), interests that "would be settled by treaty or by force" if the States were sovereign nations. *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907). The balancing of those interests "rises, therefore, above a mere question of local private right." *Id.* at 99; see *Wyoming* v. *Colorado*, 286 U.S. 494, 508-509 (1932) (describing an equitable-apportionment action as "one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people"). For those reasons, the considerations that this Court considers in managing its original-jurisdiction docket apply with particular force to equitable-apportionment actions.

In an equitable-apportionment action, this Court applies federal common law principles to allocate to each of the competing States a specified share of the waters of an interstate river. *E.g.*, *Colorado* v. *New Mexico*, 459 U.S. 176, 183 (1982); *Arizona* v. *California*, 373 U.S. 546, 597 (1963). An equitable-apportionment action culminates in a decree, which typically establishes the respective rights of the States (and in some cases the United States or Indian Tribes) to divert or store interstate waters, defined in terms of flow, volume, timing, or

a combination thereof. See, *e.g.*, *Colorado* v. *New Mexico*, 459 U.S. at 185 n.10.

In arriving at an equitable apportionment, this Court does give some weight to individuals' water use, as protected by state law. But that factor is only one among many, and this Court has repeatedly stressed that it will not simply mandate a rule of interstate priority, under which a more senior water right trumps a more junior. See *Colorado* v. *New Mexico*, 459 U.S. at 184-188; *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945). Rather, the Court determines the *overall* share of water to be allocated to each State, and state law then determines how that share is to be allocated among individual water users within that State. See, *e.g.*, *Arizona* v. *California*, 373 U.S. at 601 (confirming that "all uses of mainstream water within a State are to be charged against that State's apportionment"); *Nebraska* v. *Wyoming*, 325 U.S. at 608 (equitable apportionment was required because state law had "over-appropriated" the river beyond what the natural flow would dependably provide).

Because the equitable apportionment considers the interests of the States as sovereigns, the result binds not only the States but their water users as well, without the need for the water users to be separately represented. This Court made that clear in *Wyoming* v. *Colorado*, *supra*, in which it enforced an apportionment against a violating State. The Court had decreed a particular volume of water from the Laramie River to Colorado, based on the amounts historically diverted in four Colorado locations, and a particular volume to Wyoming. See 286 U.S. at 496. Colorado then began permitting diversions of water in locations other than the four places mentioned in the decree, causing Wyoming not to receive its full allocation. See *id.* at 508-509, 510. Colorado argued

that claims for those diversions "could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein." *Id.* at 508. This Court squarely rejected that contention: the equitable-apportionment suit was "one between States" as "quasi-sovereign[s]," and therefore "the water claimants in Colorado, and those in Wyoming, *were represented by their respective States and are bound by the decree*." *Id.* at 508-509 (emphasis added); accord *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) ("Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.").

3. Because equitable-apportionment actions adjudicate the States' sovereign interest in an equitable share of water, this Court has strictly limited intervention in those cases by non-sovereigns, such as the proposed intervenors here.

a. In *New Jersey* v. *New York*, 345 U.S. 369 (1953) (per curiam), this Court denied permission for Philadelphia to intervene in an equitable-apportionment action in which Pennsylvania was already a party. New Jersey had sued New York (and New York City) concerning the waters of the Delaware River, Pennsylvania had intervened, and the Court had entered its equitable decree. *Id.* at 370-371. Twenty years later, the defendants sought to reopen the decree. Pennsylvania opposed reopening, and at that point Philadelphia sought to intervene, citing its own interest in Delaware River water. See *id.* at 371-372.

This Court denied permission to intervene, holding that "[a]n intervenor whose state is already a party should have the burden of showing *some compelling interest in his own right*, apart from his interest in a class with all other citizens and creatures of the state, *which interest is not properly represented by the state*." *New Jersey* v. *New York*, 345 U.S. at 373 (emphases added). That requirement flowed from "the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens,'" for several reasons. *Id.* at 372 (quoting *Kentucky* v. *Indiana*, 281 U.S. at 173). First, treating the State as the representative of its citizens "is a necessary recognition of sovereign dignity," as it prevents the State from being "judicially impeached on matters of policy by its own subjects." *Id.* at 373. Second, the rule serves "good judicial administration," because allowing water users like Philadelphia to intervene alongside their States would leave "no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Ibid.*

b. This Court applied that "general rule" in *Nebraska* v. *Wyoming*, 515 U.S. 1, 21 (1995). In an action to enforce this Court's previous decree equitably apportioning the North Platte River, Wyoming sought permission to assert a cross-claim against the United States based on an alleged violation of the decree. Wyoming contended that individual federal reclamation contracts, allocating water held in federal storage facilities, were contrary to the decree. *Id.* at 15, 17. The Court permitted Wyoming to pursue that cross-claim, over the United States' objection that litigating Wyoming's theory would inevitably invite "intervention by many individual storage contractors" in the original action. *Id.* at 21.

The Court explained that the nature of an equitable-apportionment action would make such participation both unnecessary and inappropriate under the Court's longstanding rule:

> Although the claim may well require consideration of individual contracts and compliance with the Reclamation and Warren Acts, * * * [Wyoming] states a claim arising under the decree itself, one by which it seeks to vindicate its *quasi-sovereign* interests which are independent of and behind the titles of its citizens, in all the earth and air within its domain.
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> * * * * *
>
> Ordinarily, in a suit by one State against another subject to the original jurisdiction of this Court, each State must be deemed to represent all its citizens. A State is presumed to speak in the best interests of those citizens, and requests to intervene by individual contractees may be treated under the general rule that an individual's motion for leave to intervene in this Court will be denied absent a "showing [of] some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953); cf. Fed. Rule Civ. Proc. 24(a)(2). We have said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States.

Nebraska v. *Wyoming*, 515 U.S. at 20-22 (some internal quotation marks and other citations omitted).

Under the "general rule" this Court has laid down, *Nebraska* v. *Wyoming*, 515 U.S. at 21, water users may not intervene alongside their States if their only interest is in obtaining or maintaining access to some portion of the State's equitable share of water. Those users have a personal interest only in the "intramural dispute over the distribution of water within the [State]," a dispute that the equitable-apportionment case will not address. *New Jersey* v. *New York*, 345 U.S. at 373.

Sovereign entities, by contrast, do have a valid role to play in equitable-apportionment actions. That is why Pennsylvania (but not Philadelphia) was permitted to intervene in the *New Jersey* v. *New York* litigation, and why the United States and various Indian Tribes have been permitted to join such actions as well: the water rights of the Tribes are directly at issue in the equitable apportionment. See *Arizona* v. *California*, 460 U.S. 605, 614-615 (1983).[1] Indeed, in *Arizona* v. *California*, this Court noted the Indians' special status and continued enjoyment of retained sovereignty in concluding that several Tribes could intervene even though the United States could litigate on their behalf. See *id.* at 615 & n.5. The United States likewise has its own sovereign interests at stake in water-law adjudication.

B. The Special Master's Analysis Does Not Adequately Preserve The Status Of An Equitable-Apportionment Action As A Sovereign Dispute

As South Carolina correctly explains, the Special Master's recommendation would permit *non*-sovereigns

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[1] The Tribes' water rights are specifically addressed by the decrees in that case. *E.g.*, *Arizona* v. *California*, 376 U.S. 340, 344-345 (1964).

to intervene in an equitable-apportionment action for the first time. That conclusion cannot be reconciled with *New Jersey* v. *New York* or with this Court's repeated statements that an equitable-apportionment action is a dispute between sovereigns.

1. The Special Master's attempt to synthesize a broad test for intervention, based on this Court's decisions in a wide variety of original matters, did not give sufficient weight to the heightened sovereign interests at stake in litigation of this sort. The Special Master reasoned that "original jurisdiction actions by definition implicate sovereign interests," and therefore that there must be "no special rule applicable only to equitable apportionment cases that precludes intervention by non-sovereigns." Report 24. But not every original action does, in fact, implicate sovereign interests to the same degree. To the contrary, in some original actions the State's standing to sue is premised on proprietary interests or on a pure *parens patriae* theory of injury to the State's people as a whole. See, *e.g.*, *Wyoming* v. *Oklahoma*, 502 U.S. at 450-451 (standing was based on "direct injury" to Wyoming's "severance tax revenues"); *Maryland* v. *Louisiana*, 451 U.S. 725, 738-739 (1981) (standing to challenge a state gas tax was based on harm to the plaintiff States as gas consumers and on economic injury to other consumers in those States). See generally Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 290-292 (5th ed. 2003). In those circumstances intervention has been permitted when the intervenor has a distinct injury. Compare *Maryland* v. *Louisiana*, 451 U.S. at 738-739 (concluding the States had standing based on consumer injury), with *id.* at 745 n.21 (concluding that pipeline

companies could intervene based on their "direct stake" as payers of the challenged tax).

By contrast, as discussed above, in an equitable-apportionment action, the competing States are advancing sovereign interests rather than proprietary interests or interests that derive from individual water users. That is why those disputes, unlike other types of original action, are "resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States." *Nebraska* v. *Wyoming*, 515 U.S. at 22.[2]

2. The Special Master also relied on cases in which non-sovereigns have participated as defendants *ab initio*, by being named in a plaintiff State's complaint. The Special Master concluded (Report 16) that there is no "compelling logical distinction" between joinder as a defendant and intervention. In our view, however, those

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[2] As the Special Master correctly recognized (Report 24), boundary disputes implicate "core sovereign interests"; indeed, of all the issues on the Court's original docket, interstate boundary and water questions are among those that implicate States' retained sovereignty most directly. But the Special Master incorrectly suggested that this Court has affirmatively permitted non-sovereign entities to litigate those issues. In one case presenting both boundary and land-claims issues, this Court granted (summarily and without opposition) a municipality leave to intervene, but only to address the United States' claim of *title* to certain real property. *Texas* v. *Louisiana*, 416 U.S. 965 (1974) (mem.); see *Texas* v. *Louisiana*, 426 U.S. 465, 466 (1976) (per curiam). The interests that warrant intervention in a title dispute are entirely distinct from those at issue in a sovereign disagreement over borders or the allocation of rivers that cross those borders. Because the United States' claim in *Texas* v. *Louisiana* was rejected by the special master and the United States took no exception, see *id.* at 466-468, this Court never had occasion to revisit the city's participation beyond its initial summary order.

instances of permissive joinder are of limited relevance to the question of intervention. At the least, merely by allowing a State to name both sovereigns and non-sovereigns in its complaint, this Court did not signal any departure from the general rule on *intervention* laid down in *New Jersey* v. *New York* and reaffirmed in *Nebraska* v. *Wyoming*. Indeed, in *New Jersey* v. *New York* itself, this Court distinguished between the City of New York (which was properly joined as a defendant in New Jersey's bill of complaint) and the City of Philadelphia (which was denied leave to intervene because it was represented by Pennsylvania). 345 U.S. at 374-375.

The Special Master discerned from the joinder cases a principle that "a citizen of a party state may properly become a party in an original action * * * where non-incidental relief is sought against it by the plaintiff." Report 18-19. But that principle, however accurately it may describe the holdings of joinder cases, has no application to the intervention of a new defendant, against whom (by definition) the plaintiff has sought *no* relief. The would-be intervenor's willingness to subject itself to some form of relief (if the plaintiff prevails) is not enough to justify intervention. Cf. Fed. R. Civ. P. 24(a)(2) (intervention may be denied if "existing parties adequately represent [the would-be intervenor's] interest" in the litigation, even if the intervenor might have been a proper defendant).

To be sure, in some cases a plaintiff may be not just permitted but *required* to join a particular entity as a defendant, to permit a proper resolution of the plaintiff's claim. Cf. Fed. R. Civ. P. 19(b) (failure to join an indispensable party). But none of the cases on which the Special Master relied examined whether the named defendant was indispensable. Moreover, this Court has

rejected the notion that particular *water users* can be indispensable parties to an equitable apportionment. For example, because an individual water user in Wyoming "must obtain permits and priorities for the use of water from the state of Wyoming," which in turn comes from Wyoming's equitable share, the Court has recognized that the user's "rights can rise no higher than those of Wyoming, and an adjudication of [Wyoming's] rights will necessarily bind him." *Nebraska* v. *Wyoming*, 295 U.S. 40, 43 (1935) (denying the Secretary of the Interior leave to intervene because his asserted interest was that of an individual water user). "He is not a necessary party" to the equitable apportionment, the Court concluded, because "Wyoming will stand in judgment for him." *Ibid.*; cf. *United States* v. *Louisiana*, 339 U.S. 699, 701-702 (1950) (lessees were not indispensable parties to a suit between the United States and a State over title to lands including the leaseholds).

For similar reasons, even if the cases in which States have decided to join non-sovereigns as defendants were relevant, they would offer no support for the Special Master's conclusion here (Report 22-23). A State that seeks only the equitable apportionment of an interstate river is not seeking "non-incidental relief" against a user of river water in another State.

C. Relaxing The Standard To Permit Intervention Here Would Have A Significant Practical Impact On Equitable-Apportionment Adjudications

On the current record, none of the proposed intervenors appears to have made a sufficient showing of "some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly repre-

sented by the state." *New Jersey* v. *New York*, 345 U.S. at 373; see S.C. Br. in Supp. of Exceptions 38-55. Each of the proposed intervenors traces its interest in this action to its interest in the waters of the Catawba.[3] And even if the equitable apportionment of the Catawba reduces North Carolina's share of water, the impact of that reduction on North Carolina water users (including the proposed intervenors) will depend on how state-law water rights and uses are allocated. The proposed intervenors may well have a stake in the ensuing "intramural dispute," but their interests in the apportionment are represented by their States. *New Jersey* v. *New York*, 345 U.S. at 373.

Although the focus of the complaint is on certain interbasin transfers, South Carolina complains generally that the totality of uses in North Carolina, and certainly the totality of interbasin transfers, are causing the alleged shortages in South Carolina's putative share of the Catawba. All water users in North Carolina have inter-

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[3] Duke has acknowledged that its property interest in the waters that it impounds are not a sufficient basis for intervention. Duke Reply in Supp. of Mot. to Intervene 10 n.4. Rather, Duke contends that any equitable apportionment must take into account the terms of Duke's CRA. *E.g.*, *id.* at 11. But Duke need not become a party for the Court or the Special Master to become aware of what its CRA would require (if accepted by FERC); indeed, both North Carolina and South Carolina are signatories to the CRA, and Duke remains able to provide any relevant information and even argument through third-party discovery or as an amicus curiae. And so long as the terms of the CRA are taken into account in the equitable apportionment, the mere fact that Duke impounds and releases the waters being apportioned does not give Duke a sufficiently concrete interest in the outcome of the apportionment. See *id.* at 11-12; cf. S.C. Br. in Supp. of Exceptions 22-23 (noting a previous special master's conclusion that a FERC license was an insufficient basis to justify intervention).

ests that are potentially affected by the relief sought against their sovereign. Thus, the proposed rule raises the specter of wide-scale intervention by individual water users.

Such an outcome would have a negative effect on equitable-apportionment proceedings.[4] See *New Jersey* v. *New York*, 345 U.S. at 372-373. First, such a relaxation could potentially involve the Court in the resolution of intramural water disputes on the scale of a state-wide general stream adjudication. Second, even assuming that these actions could be *litigated* manageably with a significantly expanded number of parties, the expansion would make it significantly less likely that any of these cases could be *settled*. As this Court has admonished, interstate water disputes "should, if possible, be the medium of settlement, instead of invocation of [this Court's] adjudicatory power." *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943); see *Hinderlider*, 304 U.S. at 105-106 & n.11. The participation of more parties,

[4] The Special Master suggested that this problem is not implicated here, because Charlotte (for example) is "one of the recipients of the three interbasin transfers that South Carolina identifies in its Complaint." Report 25. But South Carolina's basic complaint is that North Carolina is using more of the Catawba than its equitable share. Its prayer for relief seeks to enjoin aggregate uses that exceed North Carolina's apportioned share, and does not seek to enjoin interbasin transfers as such. Compl. 10; see also S.C. Br. in Supp. of Exceptions 41-44. Thus, the outcome of any equitable apportionment will not necessarily curtail any transfers to Charlotte; which users will be affected is entirely a question of state law. Charlotte and CRWSP were noted in the complaint as large water users, but even heavy water consumption was inadequate to justify Philadelphia's intervention in *New Jersey* v. *New York*. See 345 U.S. at 373 & n.*. And Charlotte and CRWSP did not acquire a unique interest merely because South Carolina cited their interbasin transfers as manifestations of the broader problem about which it is complaining.

particularly parties that advance a narrower and more parochial interest than the State litigants, can only impede that goal.

In particular, in this case the Special Master made clear that each proposed intervenor would be permitted to intervene in both the liability and remedial phases of the litigation, subject to potential limitations (not yet identified or imposed) as to issues that "do not affect the intervenor." Report 34. As a result, those intervenors presumably have a full opportunity to object to any settlement that implicates their asserted interest in the interstate apportionment of the waters, even if they might not have a power to block such a settlement by withholding their consent. See *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 529 (1986).

CONCLUSION

South Carolina's exceptions to the First Interim Report of the Special Master should be sustained, and the motions for leave to intervene should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
WILLIAM M. JAY
Assistant to the Solicitor General
JAMES DUBOIS
K. JACK HAUGRUD
KEITH SAXE
THOMAS SNODGRASS
Attorneys

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